

[TYSER, C.J. AND FISHER, J.]

MICHAIL TOFALLIDES AND ANOTHER

v.

DERVISH MEHMED ALI.

TYSER, C.J.
&
FISHER, J.
1918
December 5

SALE OF MORTGAGED HOUSE—BALANCE OF PROCEEDS OF SALE IN HANDS OF THE SHERIFF—APPLICATION TO ATTACH—HOUSE ACCOMMODATION—CIVIL PROCEDURE LAW, 1885, SECS. 21, 72, 77.

The house of the Defendant had been sold at the instance of a mortgagee and after payment of the sum due to the mortgagee there remained a balance in the hands of the Sheriff. The Plaintiffs applied to have the money attached in execution of their judgment against the Defendant, and the District Court held that the said sum, being the proceeds of sale of a house which the Plaintiffs could not have sold in execution of their judgment by reason of the proviso to Sec. 21 of the Civil Procedure Law, 1885, could not be attached by them.

HELD (reversing the judgment of the District Court) : *That the proviso to Sec. 21 of the Civil Procedure Law, 1885, was not applicable and that the Plaintiffs were entitled to an order of attachment.*

HELD further : *That in exercising the jurisdiction conferred by Sec. 77 of the Civil Procedure Law, 1885, the Court has a judicial discretion to be exercised upon good grounds.*

This was an appeal from an order of the District Court of Kyrenia. The facts are set out in the head-note.

Sava Christis for the Appellants.

The proviso to Sec. 21 of the Civil Procedure Law, 1885, has no application to this case. The District Court referred to *Triantafyllides v. Solomo*, C.L.R., VI., 90 in support of their decision, but in that case the judgment creditor instituted proceedings for the sale of the judgment debtor's immoveable property, and under those circumstances the Supreme Court held that Sec. 21 (then Sec. 48) must be read with Sec. 27 (then Sec. 53) and that the judgment creditor was bound by the proviso to Sec. 21. (He referred to *Haji Yeorghi Haji Sava v. Fatma Mola Haji Hussein and others*, decided by the Supreme Court on the 22nd April, 1922).

Loizides for the Respondent.

The Court had a discretion under Sec. 77 of the Civil Procedure Law, 1885, and that discretion should not be interfered with. The effect of allowing this application would be to take away the means by which

FYSER, C.J. the Respondent could acquire house accommodation. That is contrary
&
FISHER, J. to the spirit of Sec. 21.

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Judgment : This appeal must be allowed. The Respondent mortgaged the house in question and it was sold at the instance of the mortgagee. The mortgage debt was paid out of the proceeds of sale and there remained a balance in the hands of the Sheriff. That balance the Plaintiff seeks to attach under Sec. 77 of the Civil Procedure Law, 1885, in satisfaction of his judgment debt. It is contended that the proviso to Sec. 21 of that Law precludes the success of the application. That section is included in the portion of the Law which deals with execution of judgments by sale of immoveable property and the proviso runs as follows:—

“ Provided that where the property consists in whole or in part of a
“ house or houses there shall be left to or provided for the debtor such
“ house accommodation as shall in the opinion of the Court be absolutely
“ necessary for him and his family.”

The object of the proviso seems to be to ensure that a judgment debtor shall not be rendered homeless by reason of proceedings to execute a judgment by the sale of his immoveable property being taken against him. The case of *Triantafyllides v. Solomo* which has been referred to is to that effect. In the present case the debtor by mortgaging his house empowered the mortgagee to have it sold and have the mortgage debt paid out of the proceeds of sale. This power the mortgagee exercised and the sum of money in the hands of the Sheriff, the balance remaining after the mortgage debt has been paid, is the subject matter of this application. Had this sum been handed to the Defendant it would have become as much liable to be made available for payment of his debts as any other money of his.

The Appellant is not seeking to sell the immoveable property of the Respondent, and the Respondent's house accommodation has been sold in consequence of something voluntarily done by himself; yet it is contended that the Respondent is entitled to take the surplus moneys in the hands of the Sheriff for his own use relieved from any liability to pay any debt out of it. That contention cannot in our opinion prevail, and the money is liable to be attached under Sec. 77 of the Civil Procedure Law, 1885.

As regards the contention that the District Court had a discretion we think that it had. The jurisdiction of the Court is, in our opinion, similar to that exercisable in England by the High Court of Justice under O. 45

of the Rules of the Supreme Court. See *Martin v. Nadel*, 1906, 2. K.B., 26 in which the discretion was exercised at the instance of the proposed garnishee. The discretion however does not entitle a Court to act upon a merely benevolent point of view. There does not appear to be any basis for refusing the application in this case but a strained reading of the proviso to Sec. 21, and we think therefore that the Court were wrong in refusing the application.

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